91-829

No. _____

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SUPREME COURT OF THE UNITED STATES

_____, Term, 19___

_____

ESTATE OF MATT JONES . . . . . Petitioner,

versus

UNITED STATES OF AMERICA . . . . Respondent

_____

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

_____

BRIEF FOR PETITIONER WITH APPENDIX

_____

MICHAEL R. HEAD
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277 Lexington Street
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606/873-8546

Attorney for Petitioner

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QUESTIONS PRESENTED FOR REVIEW

Did the decision by the United States Court of Appeals for the Sixth Circuit erroneously decide that the criminal conviction of a father under 21 U.S.C. 846 and 18 U.S.C. 2(a) & (b) for conspiring with his son to manufacture, produce and grow marijuana on the family farm, and to possess marijuana with intent to distribute same, collaterally estopped the father in a subsequent civil action to forfeit the farm brought pursuant to 21 U.S.C. 881(a)(7) from asserting the statutory defense that he did not know his son grew the marijuana on his farm and that he did not give his consent to his son's activities, even though the father was acquitted at trial on the substantive charges?

LIST OF PARTIES TO PROCEEDING BELOW

Margaret Jones was a party to the appeal to the United States Court of Appeals for the Sixth Circuit below. Margaret Jones is the wife of Matt Jones, the latter of whom is now deceased and his successor in interest, the Estate of Matt Jones, is Petitioner herein. The appeal of Margaret Jones to the United States Court of Appeals for the Sixth Circuit was successful and her case has been remanded to the United States District Court for the Eastern District of Kentucky for further proceedings. Margaret Jones has no interest in the outcome of this Petition. All parties to the proceeding below have been notified as required by Rule 12.4 of this Court.

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TABLE OF AUTHORITIES

No. _____

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SUPREME COURT OF THE UNITED STATES

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ESTATE OF MATT JONES . . . . . Petitioner

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_____

Petition for Writ of Certiorari to the
United States Court of Appeals
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_____

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_____

REFERENCE TO OPINIONS

A Decision herein by the United States Court of Appeals for the Sixth Circuit was filed on August 16, 1991 and styled United States of America, Plaintiff-Appellee, vs. 127.814 Acres of Land, Defendant, Estate of Matt Jones and Margaret Jones, Defendants-Appellants, No. 90-6188. The decision affirmed the Order and Judgment of the United

States District Court for the Eastern District of Kentucky at Lexington, Nos. 87-433 and 87-473, as to Estate of Matt Jones, and reversed said Order and Judgment, which granted summary judgment against defendant Margaret Jones, and remanded for further proceedings consistent with the decision. The decision of the United States Court of Appeals for the Sixth Circuit may be found in the Appendix, pages 1a to 14a. The Order and Judgment of the United States District Court for the Eastern District of Kentucky at Lexington may be found in the Appendix, pages 1b to 4b. The Memorandum Opinion of the District Court filed in support of the aforementioned Order and Judgment may be found in the Appendix, pages 1c to 41c.

STATEMENT OF JURISDICTION

The filing date of the Decision of the United States Court of Appeals for the Sixth Circuit of which review is sought in this case is August 16, 1991.

Jurisdiction is conferred upon this Court to review by writ of certiorari the appellate decision question by 28 U.S.C. 1254(1).

The Court should grant the writ of certiorari under the authority of Rule 10.1(a) and (c) because the United States Court of Appeals for the Sixth Circuit has sanctioned a departure by the Distict Court for the Eastern District of Kentucky so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, and because the United States Court of Appeals for the Sixth Circuit has decided a federal question in a way that conflicts with the applicable decisions of the Court.

In Emich Motors Corporation, et al. v. General Motors Corporation, et al., 340 U.S. 558, 569, 71 S.Ct. 408, 414 (1951), this Court enunciated its basic principles concerning the collateral estoppel effect of a general verdict of guilt in a criminal

prosecution for conspiracy:

> A general verdict of the jury or judgment of the court without special findings does not indicate which of the means charged in the indictment were found to have been used in effectuating the conspiracy. And since all of the acts charged need not be proved for conviction, such a verdict does not establish that defendants used all of the means charged or any particular one. Under these circumstances what was decided by the criminal judgment must be determined by the trial judge . . . upon an examination of the record, including the pleadings, the evidence submitted, the instructions under which the jury arrived at its verdict, and any opinions of the courts. (citations omitted).

The Court has further opined in United States v. International Building Company, 345 U.S. 502, 73 S.Ct. 807 (1953):

> In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action. (citations omitted).

The United States District Court for the

Eastern District of Kentucky at Lexington, subsequent to the criminal conspiracy conviction of Matt Jones, improperly stated the ultimate issue involved in Petitioner's defense to the forfeiture of his farm.

The United States Court of Appeals for the Sixth Circuit impliedly recognized that the District Court had focused on the wrong issue involved in Petitioner's defense to the forfeiture of his farm, but it incorrectly applied the principles enunciated by this Court in the opinions cited above and wrongly decided that Petitioner was collaterally estopped by Matt Jones's criminal conspiracy conviction from litigating the ultimate issue involved in Petitioner's defense.

STATUTES INVOLVED IN THE CASE

The following statutes are involved in the case at bar:

21 U.S.C. 881(a)(7):

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> . . . .

(7) All real property, including any right, title, and interest in the whole of any lot or tract of land and any appurtenances or improvements, which is used or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner. (emphasis added).

STATEMENT OF THE CASE

This is a Petition for Certiorari by the Estate of Matt Jones from a decision of the United States Court of Appeals for the Sixth Circuit affirming an improper grant of summary judgment against the Petitioner by the U.S. Distict Court for the Eastern District of Kentucky which forfeited Appellant's interest in his family farm pursuant to 21 U.S.C. 881(a)(7).

Jurisdiction was conferred on the United States District Court for the Eastern

District of Kentucky at Lexington pursuant to 28 U.S.C. 1345 and 1355.

On May 14, 1987, marijuana plants were found growing on Petitioner's farm. Matt Jones and his son were indicted in United States District Court, Eastern District of Kentucky, Lexington Division, No. 87-35, on October 7, 1987 on three counts. The first count charged him and his son, Steve Jones, with conspiracy to manufacture, produce and grow marijuana, a Schedule I controlled substance, and conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846, and 18 U.S.C. 2(a) & (b). The second and third counts charged Matt Jones and his son with knowingly and intentionally manufacturing marijuana and possessing marijuana with the intent to distribute it in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(C) & (D), and 18 U.S.C. 2(a) & (b).

On November 16, 1987 the United States of America filed a Complaint for Forfeiture In

Rem in United States District Court for the Eastern District of Kentucky at Lexington, No. 87-433 to forfeit the Petitioner's interest in his farm pursuant to 21 U.S.C. 881(a)(7). Matt Jones, record owner of the real property, filed an Answer in the forfeiture action denying that he knew that the marijuana had been growing on his farm prior to its discovery by the police, and denying that he consented to it being grown on his farm.

Steve Jones, son of Matt Jones, pleaded guilty to the first count of the aforementioned indictment, namely, conspiracy to manufacture, produce and grow marijuana, a Schedule I controlled substance, and conspiracy to possess marijuana with intent to distribute same, in violation of 21 U.S.C. 846, and 18 U.S.C. 2(a) & (b).

At the criminal trial of Matt Jones's charges, Matt Jones's son, Steve testified that he alone carried on the cultivating activity on the farm unbeknownst to his

family. He described how he hid all the activity from his parents. (United States of America vs. Matt Jones and Steve Jones, United States District Court for the Eastern District of Kentucky, No.87-35, Transcript of Hearing, Volume I, page 31 et seq.).

Matt Jones defended with evidence that the plants were either hidden out of sight in tall grass and in out-of-the-way locations such as behind buildings or inside abandoned siloes. (Id. at Volume I, page 119 et seq.).

An opthamologist also testified that Mr. Jones had long-standing, severe damage to the retinas of both eyes from histoplasmosis which prevented him from seeing any detail. (Id. at Volume II, page 88, et seq.).

Of critical importance to the issue at bar is evidence introduced in the criminal trial by the United States concerning a marijuana growing guide found in the residence of Matt Jones. Kentucky State Police Detective, Ronnie Ray, testified on direct:

"Q: . . . There has been some testimony yesterday about a marijuana growing guide book, found in the home of Mr. Matt Jones.

A: Yes, sir.

Q: Did you, could you tell the jury and the Court if you were present when the book was found?

A: Yes, sir, I was.

Q: And what was the date of that?

A: The date was November 18th, 1987.

Q: And where exactly was the book found?

A: The book was found in the front living room of Mr. Jones's residence. It was lying on a card table in the residence, in the living room.

(Id. at Volume 2, page 10).

The jury entered a verdict of guilt against Matt Jones on the first count, namely, conspiring to manufacture, produce and grow marijuana, a Schedule I controlled substance, and to possess marijuana with intent to distribute, in violation of 21 U.S.C. 846 and 18 U.S.C. 2 (a)(b). They acquitted Matt Jones on the substantive counts of the indictment.

After a judgment on the jury verdict was entered in the criminal case, the United

States moved the District Court for summary judgment. The motion for summary judgment of the United States was supported by a Memorandum, attached to which was, among other things, a certified copy of the criminal judgment against Matt Jones.

By its Order and Judgment entered August 31, 1989, the United States District Court for the Eastern District of Kentucky granted the government's motion for summary judgment against the Petitioner finding that there were no genuine issues of material fact and that the United States was entitled to a judgment as a matter of law.

In its Memorandum Opinion supporting its Order and Judgment, the District Court incorrectly opined that the prior criminal conspiracy conviction of Matt Jones collaterally estopped Petitioner from arguing that he did not know about the marijuana. The District Court stated that Matt Jones's statements about his lack of knowledge and his lack of consent in his affidavit and his

answer were "sufficiently belied by his conviction on Count I in Lexington Criminal Action 87-35." (Memorandum Opinion, page 12).

The District Court misstated the controlling issue when it asserted that "Matt Jones cannot seriously contend that the same issue, knowledge of the marijuana plants, is not involved in both the criminal action and the present action." (emphasis added) (Memorandum Opinion, page 12). The District Court should have examined whether the criminal judgment decided the issue of Matt Jones's knowledge of the cultivation activity on his farm. Instead, it stated that Matt Jones's statements of his lack of knowledge and consent in his affidavit and his answer were "sufficiently belied by his conviction on Count I in Lexington Criminal Action 87-35." (Memorandum Opinion, page 12).

An appeal was filed with the U.S. Circuit Court of Appeals for the Sixth Circuit. In its appeal, Petitioner argued that Matt

Jones's knowledge of and consent to his son's use of the farm were not identical to issues decided in the criminal trial, were not actually litigated in the criminal trial, and were not necessary and essential to the decision in the criminal trial. Therefore, Petitioner argued, the three step test for determining if collateral estoppel would prevent relitigation of an issue, as enunciated in United States v. Smith, 730 F.2d 1052 (6th Cir. 1984), had not been fulfilled and collateral estoppel should not lie.

The Court of Appeals stated that the District Court had "correctly considered each of these elements [of the Smith test] and determined each was met." (August 16, 1991 Decision, page 6). It reviewed Petitioner's arguments that the District Court focused on the wrong issue and stated:

> in order to convict, the jury necessarily would have found that Matt Jones knew about and consented to the marijuana discovered on his farm. The facts at trial involved marijuana only on his farm. . . .

> [N]o genuine issue of material fact exists as to whether Matt Jones had knowledge of the use of his real property or consented to the use. (Id.)

The Court of Appeals found that the District Court did not err in granting summary judgment against Petitioner and affirmed the decision of the District Court below as to Petitioner.

ARGUMENTS AND REASONS FOR GRANTING THE WRIT OF CERTIORARI

The District Court below was presented with a genuine issue of material fact with respect to a defense asserted by Matt Jones. Under 21 U.S.C. 881(a)(7), the United States cannot forfeit property "to the extent of an interest of any owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner. (Emphasis added).

In other words, if Petitioner is able to show that he was not aware that his son was growing marijuana on his farm, and that he

did not consent to him growing it there, his interest could not be forfeited, even if it were shown that in some other way he was involved in illegal drug activity, which he denies.

In order to use Matt Jones's criminal conviction to collaterally estop him from litigating the issue of whether he knew about or consented to the activity which his son conducted on his farm, the United States had the burden of proving that issue was decided adversely against him in the prior criminal action. "The burden of pleading and proving the identity of issues rests on the party asserting the estoppel. . . . To sustain this burden a party must introduce a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action." Hernandez vs. City of Los Angeles, 624 F.2d 935, 937 (9th Cir. 1980).

The United States Court of Appeals for the Sixth Circuit has announced it applies the following test to determine the

applicability of collateral estoppel:

> The doctrine of collateral estoppel arises when an issue in a prior trial is: 1) identical to that involved in a subsequent action, 2) actually litigated in the earlier action, and 3) necessary and essential to the judgment on the merits. United States v. Smith 730 F.2d 1052, 1057 (6th Cir. 1984)(Citations omitted).

Applying the test's first two standards, it cannot be disputed that the issues in the criminal trial were not identical to those in the forfeiture action, and that the criminal jury did not make an express finding that Matt Jones knew of or consented to the illegal activity which occurred of his farm. Nowhere in the criminal judgment against Matt Jones does it state that Matt Jones knew of or consented to the illegal activity on his farm.

Further, with respect to the third component of the test announced in Smith, the United States cannot show that the issue of Matt Jones' knowledge was "necessary and essential to the judgment on the merits."

In its instructions to the jury in said

criminal action, the District Court correctly stated:

> The evidence in the case need not establish that all the means or methods set forth in the indictment were agreed upon to carry out the alleged conspiracy, nor that all means or methods which were agreed upon were actually used or put into operation, nor that all the persons charged to have been members of the alleged conspiracy were such.
>
> . . . .
>
> So if a defendant or any other person with understanding of the unlawful character of a plan knowingly encourages, advises or assists for the purpose of furthering the undertaking or scheme, he thereby becomes a wilful participant, a conspirator. (Emphasis added)(Transcript of Proceedings in E.D. KY, Lexington Division, No. 87-35, at Volume III, pages 77 an 78).

Based on the testimony quoted above concerning the marijuana growing manual found in the Petitioner's home by the investigating Kentucky State Police Detective, the jury could have convicted Matt Jones on the basis of their belief beyond a reasonable doubt that Matt Jones knew of his son's intention to manufacture and possess marijuana for

distribution, and that he encouraged and assisted his son's efforts with advice about such growing as found in the marijuana growing manual, without the jury having to believe that Matt knew of or consented to his son's intention to carry out said activity on his farm.

Petitioner's argument, therefore, is that it is not logically necessary and essential to Matt Jones's criminal conviction that the jury found he knew of his son's activity on his farm.

To further support the above interpretation of the jury's verdict, it should be noted with emphasis that Matt Jones was acquitted of the substantive charges of manufacturing and possessing marijuana with the intent to distribute same. Clearly the jury questioned the government's proof that Matt Jones was directly involved in the activity on the farm.

In this case, there is no showing either in the record or by extrinsic evidence that

the issues raised by the pleadings in the forfeiture action were determined by the jury in the criminal action. Absent such showing, preclusion must fail.

As stated in the Court's decision in Emich Motors Corporation, et al. v. General Motors Corporation, et al., 340 U.S. 558, 569, 71 S.Ct. 408, 414 (1951):

> [S]ince all of the acts charged need not be proved for conviction, such a verdict does not establish that defendants used all of the means charged or any particular one . . . what was decided by the criminal judgment must be determined by the trial judge . . . upon an examination of the record, including the pleadings, the evidence submitted, the instructions under which the jury arrived at its verdict, and any opinions of the courts.

Neither the District Court nor the Court of Appeals examined the transcripts of the criminal action to adequately consider Petitioner's argument that the jury could have convicted Matt Jones for conspiracy without believing that he knew about his son's activity on the farm. Therefore, neither Court determined what was "actually

litigated and determined" in the criminal action as this Court stated they must in United States v. International Building Company, 345 U.S. 502, 505, 73 S.Ct. 807, 809 (1953).

Matt Jones was entitled to a trial of the factual issue of whether he knew about or consented to the marijuana growing activities on his farm property, which issue, if decided favorably, would prevent forfeiture of his farm under 21 U.S.C. Section 881(a)(7).

The United States did not meet its burden imposed by the Federal Rules of Civil Procedure, Rule 56(c) because it did not show that there was no genuine issue of material fact. The District Court's grant of summary judgment to the United States against Matt Jones was therefore improper, and the United States Court of Appeals should have reversed the decision and remanded the case for further proceedings.

CONCLUSION

For the foregoing reasons the Petitioner respectfully requests this Honorable Court to grant the Petition for Writ of Certiorari in this case in order to rectify the misapplication of the law by the United States Court of Appeals for the Sixth Circuit and the United States District Court for the Eastern District of Kentucky at Lexington.

Respectfully submitted,

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COUNSEL FOR PETITIONER

PROOF OF SERVICE

I, Michael R. Head, counsel for the Petitioner, hereby certify that three copies of the foregoing Petition for Writ of Certiorari were mailed postage prepaid this 14 day of November, 1991, to Solicitor General, Department of Justice, Washington, D.C. 20530; and the United States Attorney, P.O. Box 1490, Lexington, Kentucky 40591.

MICHAEL R. HEAD

APPENDIX

NOT RECOMMENDED FOR PUBLICATION
No. 90-6188

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

127.814 ACRES OF LAND,
Defendant,
ESTATE OF MATT JONES and
MARGARET JONES,
Defendants-appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

Decided and Filed August 16, 1991

BEFORE: GUY and NORRIS, Circuit Judges; and BROWN, Senior Circuit Judge.

PER CURIAM. Pursuant to 21 U.S.C. Sec. 881(a)(7), the United States brought this action for civil forfeiture of the defendants' real property, a Kentucky farm, after the defendant Matt Jones was convicted of conspiracy to manufacture, grow, and produce marijuana. Jones' wife, Margaret Jones, was not criminally prosecuted but intervened in the civil forfeiture action to protect her property interest in the farm.

After Matt jones' conviction, but before the district court's final judgment in the civil forfeiture action, Matt Jones died. Margaret Jones' dower interest in the farm, if not forfeited prior to Matt's death, would become a present property interest at his death.

The district court granted summary judgment in favor of the government with respect to both of the defendants. The estate of Matt Jones as well as Margaret Jones contend that the district court erred in granting summary judgment for the United States. For the reasons that follow, we **AFFIRM** the district court's grant of summary judgment for the government against the defendant Estate of Matt Jones. We **REVERSE**, however, the grant of summary judgment for the government against the defendant Margaret Jones and **REMAND** for proceedings consistent with this option.

I.

On May 14, 1987, Kentucky State Police Officer Ronnie Ray went to the Jones'

farm to investigate the theft of some of Jones' cattle. In plain view, Officer Ray saw cultivated marijuana being grown in a field near the house. Altogether, Jones [sic] found 212 marijuana plants either in potted containers in outbuildings on Jones' land or growing in his open field.

On October 7, 1987, Matt Jones and his son Steve Jones were charged under a three count indictment dealing with the marijuana. The first count charged conspiracy to manufacture, produce and grow marijuana. The other two counts charged the two with the offenses of producing marijuana and possession with intent to distribute. Steve Jones pled guilty to count one of the indictment with the agreement that the other two counts would be dropped. A jury convicted Matt Jones on court one, but acquitted him on counts two and three.

During the pendency of the indictment, the United States filed its complaint against Matt Jones seeking civil

forfeiture of the Jones' farm under 21 U.S.C. SEc. 881(a)(7). Margaret Jones joined the civil forfeiture suit in an attempt to protect her dower interest in the property. As stated, after Matt Jones' conviction, but prior to the conclusion of the civil suit, Matt Jones died. His estate has continued to contest the civil forfeiture action.

In granting summary judgment for the government against the defendant Estate of Matt Jones, the district court applied the theory of collateral estoppel regarding essential issues decided by his criminal conviction. Moreover, the district court granted summary judgment for the government against the defendant Margaret Jones because, the district court concluded, she failed to raise a material issue of fact concerning her innocent interest in the land. Both defendants now appeal that judgment to this court.

II

On appeal, the defendants argue that

the district court applied an incorrect standard for determining whether the forfeiture should be granted. The defendants contend that the district court applied the "exceptionally innocent" owner standard. The "exceptionally innocent" owner standard requires that the defendant prove three things to avoid forfeiture: (1) the defendant was unaware of the criminal conduct; (2) the defendant was uninvolved in the criminal conduct; and (3) the defendant did everything reasonable to prevent the proscribed use of the property.[1] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689-90 (1974). The defendants claim that this standard only applies to personal property, not real property such as that involved in the case at bar. In order to avoid forfeiture under the forfeiture provision dealing solely with real property, 21 U.S.C. Sec. 881(a)(7), the defendants contend that they only were required to show that they lacked knowledge of the illegal

activity on their property and did not consent to it. The government concedes that the "exceptionally innocent" standard is an incorrect standard, but maintains that the district court did not apply that standard.

The "exceptionally innocent" ownership standard, the higher of the two standards mentioned above, is applied in cases involving 21 U.S.C. Sec. 881(a)(4). See, One 1976 Cessna Model 210L Aircraft, 890 F.2d 77, 80 (8th Cir. 1989). Section 881(a)(4) applies only to forfeiture of personal property, not real property. The section 881(a)(4) standard is higher in that it requires the defendant, to prevail, to do everything reasonable to prevent the illegal use of the property. Under section 881(a)(7), the owner need prove only lack of knowledge or consent.

In granting summary judgment for the government in this case, the district court stated:

> if the claimant is "exceptionally innocent," as

> defined by the United States Supreme Court in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), a case involving forfeiture of personal property, then a defense to forfeiture exists. The claimant bears the burden of proving his exceptional innocence."

It is clear, therefore, that the district court applied the "exceptionally innocent" owner standard to the defendants. Under the correct standard, the defendants could avoid the forfeiture of their interests in the farm if they merely were without knowledge of the activity, or did not consent to the illegal activity. See 21 U.S.C. Sec. 881(a)(7). Thus, the district court applied an incorrect standard.

Although it applied a wrong standard, the district court correctly determined that there was no genuine issue of material fact concerning the defendant Matt Jones' knowledge or consent of the marijuana production. Matt Jones was convicted on conspiracy to produce marijuana. The district court relied on the theory of

collateral estoppel or issue preclusion in determining that no genuine issue of material fact exists as to Matt Jones' awareness of the criminal conduct on his land.

The doctrine of issue preclusion applies if three requirements are meet. First, the issues in the prior trial must have been identical. Second, the issue must actually have been litigated. Third, it must have been necessary and essential to the judgment on the merits. United States v. Smith, 730 F.2d 1052 (6th Cir. 1984). The district court correctly considered each of these elements and determined that each was met.

The Estate argues on appeal, however, that the jury did not decide the issue of whether Matt Jones knew or consented to the illegal activity on his farm in convicting him of conspiracy. According to the Estate of Matt Jones, Matt Jones could have been convicted by the jury if he knew, encouraged and assisted his son in the

manufacture of the marijuana, without the jury having to believe that he knew about the 212 plants on his farm.

The district court correctly rejected this argument. The issue at the criminal trial was Matt Jones' involvement in the production of marijuana. The jury convicted him of the conspiracy charge. In order to convict, the jury necessarily would have found that Matt Jones knew about and consented to the marijuana discovered on his farm. The facts at trial involved marijuana only located on his farm. Although the district court applied the incorrect standard to determine whether the Estate of Matt Jones could avoid forfeiture, no genuine issue of material fact exists as to whether Matt Jones had knowledge of the use of his real property or consented to the use. Thus, no issue of material fact exists under the correct standard for forfeiture. Consequently, the district court did not err in granting summary judgment in favor of the government

as to the claim against the Estate of Matt Jones.

III

Because Margaret Jones was not criminally charged or convicted of any charges concerning the marijuana, the theory of collateral estoppel does not apply to her. Thus, in reviewing the district court's grant of summary judgment, we must review de novo the pleadings, admissions and affidavits to determine whether a genuine issue of material fact exists regarding Margaret Jones knowledge or consent of the criminal conduct on the Jones farm. Fed R. Civ. P. 56(c).

It should be noted, however, that Margaret Jones claims partial ownership in the land based on her dower interest as the wife of Matt Jones. The district court assumed that Margaret's interest sufficiently had vested prior to Matt's death that she was at least a partial owner. The government does not challenge this on appeal.

The district court held, based on

the affidavits of Officer Ronnie Ray and Deputy United States Marshal Robin Maley, that there was no material issue of act concerning Margaret's knowlege of the marijuana production on the farm. Officer Ray was the police officer who initially discovered the marijuana. During the time that he was at the residence, he looked out into a field and noticed cultivated marijuana plants. After receiving permission to search the premises, he discovered 212 marijuana plants in buildings on the farm and in an open field adjacent to the back of the house.

Officer Ray stated in his affidavit that the cultivation was a considerable enterprise. Ray further stated in his affidavit that he discovered 300 feet of water hose leading from a faucet attached to the house to the plants. According to his affidavit, the marijuana in the field was about three feet tall and visible from the fence surrounding the house. Upon investigation, Officer Ray stated, he

discovered that Margaret Jones paid electric bills that increased substantially during the sixteen months before the arrests. The government contends that this is explained by the lights used for indoor marijuana production. Moreover, Deputy United States Marshal Robin Maley stated in her affidavit that, while taking inventory in the Jones' home of property for seizure, she discovered in plain view a book entitled "Marijuana Growers Guide" and a marijuana-growers' magazine entitled "High Times."

In opposition to the motion for summary judgment Margaret Jones submitted her own affidavit. In the affidavit, she denied, or had an innocent explanation for, essentially every contention in the affidavits submitted by the government. She denied any knowledge of growing marijuana or even that any marijuana was in plain view. She contended that it was all in buildings or hidden in tall grass. She denied that any garden hose ran from the house to the

marijuana plants. Margaret Jones stated,"[e]very suspicious circumstance, which I now know is explained by the marijuana growing activity carried out by my son, was ostensibly explained by innocent circumstances at the time. For instance, the high electric bills were explained to me by [my son] as a result of his having an unusual number of baby chickens ... which chickens need heat lamps." Thus, Margaret Jones' affidavit refutes all of the officers' contentions.

The district court held that there was no material issue of fact concerning Margaret's knowledge of the marijuana. We disagree. The conflict between the law enforcement officers' affidavits and Margaret Jones' affidavit creates a genuine issue of material fact concerning whether Margaret Jonew knew of the activity on the land.

IV

We **AFFIRM** as to the estate of Matt Jones, but we **REVERSE** the decision of the

district court granting summary judgment against the defendant Margaret Jones and **REMAND** for further proceedings consistent with this opinion.

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footnote on page 4

1 The burden of proof in a forfeiture case shifts from the government to the defendant once the government has shown probable cause to institute a forfeiture action. United States v. $22,287.00 in United States Currency, 709 F.2d 442 (6th Cir. 1983). The defendants concede that the government established probable cause. The burden, therefore, is placed on the defendants to show that they are "innocent parties."

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 87-443

UNITED STATES OF AMERICA PLAINTIFF

VS.

127.814 ACRES OF LAND,
MORE OR LESS, LOCATED IN
WOODFORD COUNTY, KENTUCKY DEFENDANT

AND

CIVIL ACTION NO. 87-473

THE FEDERAL LAND BANK
OF LOUISVILLE, PLAINTIFF

VS.

MATT JONES, ET AL., DEFENDANTS

ORDER AND JUDGMENT

* * * * *

In accordance with the Memorandum Opinion entered on the same date herewith,

IT IS HEREBY ORDERED and ADJUDGED, as follows:

1. There is no genuine issue of material fact and the United States is entitled to judgment as a matter of law.

2. The motion of the United States for summary judgment against defendants Matt

Jones, Margaret Jones and Steve Jones is GRANTED; however, the court will delay entry of a final judgment herein pending (1) advice from counsel for the United States concerning whether the government elects to retain the defendant property under 28 U.S.C. Sec. 2049 a(b) and compensate the innocent owners/mortgagees, or whether the government elects to release the defendant property to the innocent owners/mortgagees for foreclosure, and (2) advice from the counsel for the innocent owners/mortgagees as to whether the mortgagees have reached an agreed stipulation as to lien priorities.

3. The information sought by the court in numerical Paragraph 2 shall be contained in a status report filed in the record within thirty (30) days from the entry of this Order and Judgment.

4. Matt Jones shall have NO RECOVERY on his counterclaim against the United States.

5. Margaret Jones shall have NO

RECOVERY on her counterclaim against the United States.

6. Pursuant to K.R.S. 376.075, the Surveyor's Lien of Malcolm Endicott, d/b/a Endicott & Associates, is superior to that of all other creditors of Matt Jones and Margaret Jones, including the claim of the United States. He is entitled to $2,500.00, plus interest at the rate of 12% per annum from September 10, 1987, plus costs, until paid.

7. Next in priority to the above Surveyor's Lien is the claim of the Federal Land Bank of Louisville. It is entitled to $13,262.11, plus interest at the contract rate from the date of default at the rate of 13.75% per annum, plus post-seizure interest and costs.

8. Due to the conflicting claims of the remaining innocent owner/mortgagees, the court is presently unable to determine either the priority or the validity of their claims.

9. The motion of Matt Jones and

Margaret Jones for oral argument on the motion of the United States for summary judgment is DENIED.

10. This matter is CONTINUED GENERALLY, pending the filing of the aforementioned Status Reports and further orders of the court.

This 31st day of August, 1989.

SCOTT REED, SENIOR JUDGE

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 87-443

UNITED STATES OF AMERICA — PLAINTIFF

VS.

127.814 ACRES OF LAND,
MORE OR LESS, LOCATED IN
WOODFORD COUNTY, KENTUCKY — DEFENDANT

AND

CIVIL ACTION NO. 87-473

THE FEDERAL LAND BANK
OF LOUISVILLE — PLAINTIFF

VS.

MATT JONES, ET AL., — DEFENDANTS.

MEMORANDUM OPINION

* * * * *

INTRODUCTION

The United States brings this action, pursuant to 21 U.S.C. Sec. 881(a)(7), for forfeiture of the defendant real property. As grounds for this action, in its complaint filed on November 16, 1987, plaintiff alleges that on or about May 14, 1987, approximately 212 marijuana plants were found growing on the defendant real property

in potted containers and otherwise, in or around outbuildings and inside a silo. By reason thereof, plaintiff submits that the defendant real property is subject to forfeiture under 21 U.S.C. Sec. 881(a)(7). After a shwoing of probable cause was made to the court, and arrest warrant in rem was executed on November 16, 1987.

At the time of the filing of the complaint, the United States advised the court that the defendant real property was also subject to a foreclosure action in Woodford Circuit Court, styled Federal Land Bank of Louisville v. Matt Jones and Margaret Jones, husband and wife, et al. (87-CI-248). On December 14, 1987, defendant United States of America petitioned to remove the Woodford Circuit action to the United States District Court, pursuant to 28 U.S.C. Sec 1441. This removed action was designated as Lexington Civil Action No. 87-473 and was assigned to United States District Judge Henry R. Wilhoit, Jr. Subsequently, the United States

moved to consolidate this removed action with the present action. On January 8, 1988, Judge Wilhoit ordered that the removed action (87-473) be consolidated with the instant action (87-433), and that hereinafter both actions would be singularly referred to as 87-433.

FACTUAL BACKGROUND

On October 7, 1987, claimants Matt Jones and Steve Jones were indicted by the grand jury in a three-count indictment charging them with, inter alia, conspiracy to manufacture, produce and grow marijuana, a Schedule I controlled substance, with intent to distribute, in violation of Title 21 United States Code Sec. 846 and Title 21 United States Code Sec 2(a)(b). This indictment is styled United States v. Matt Jones and Steve Jones, Lexington Criminal Action 87-35. Both claimants were convicted of these offenses. The record reflects that claimant Steve Jones entered a plea of guilty to Court 1 of the indictment (the

aforementioned conspiracy to manufacture, produce and grow marijuana and to possess marijuana with intent to distribute same). Claimant matt jones went to trial on this indictment; on February 19, 1988, the jury found him guilty on Court 1 of the indictment; he was acquitted on Courts 2 and 3 of the indictment. Both Steve Jones and Matt Jones were sentenced by United States District Judge Eugene E. Siler, Jr., on March 31, 1988. Claimant Matt Jones has appealed his conviction to the United States Court of Appeals for the Sixth Circuit; this appeal is still pending.

To reiterate, the aforementioned criminal indictment (87-35) was returned against claimants matt Jones and Steve Jones on October 7, 1987. During the pendency of this indictment, on November 16, 1987, the United States filed its complaint for forfeiture of the defendant real property, pursuant to Title 21 U.S.C. sec. 881(a)(7).

PENDING MOTIONS

This matter is before the court on the following motions:

1. Claimant Federal Land Bank of Louisville, by counsel, has moved for entry of judgment declaring (a) that its mortgage on the defendant property has first priority over all other mortgages on said property, and (b) that as mortgagee, it is an innocent owner of the defendant property.

2. Claimant Hargus Sexton, by counsel, has moved for entry of judgment declaring (a) that his mortgage is second in priority behind that of the Federal Land Bank of Louisville, and (b) that as mortgagee, he is an innocent owner of the defendant property.

3. Claimant United Tobacco Warehouse Company, Inc., by counsel, has moved for entry of judgment declaring (a) that its mortgage is second in priority behind that of the Federal Land Bank of Louisville, and (b) that as mortgagee, it is an innocent owner of the defendant property.

4. The plaintiff, by counsel, has moved for summary judgment against claimants Matt Jones and Margaret Jones, the owners of record of the defendant property, and claimant Stephen Jones.

5. Claimants Matt Jones and Margaret Jones, by counsel, have moved for oral argument on the motion of the United States for summary judgment.

All of the aforementioned motions have been fully briefed and are ripe for consideration. In addition to the foregoing motions, the following other individuals have filed claims against the defendant property:

1. Pursuant to K.R.S. 376.075, claimant Malcolm Endicott, d/b/a Endicott & Associates, has filed a claim for $2,500.00, plus interest, against the defendant property for surveying seervices he says he performed for the owner thereof, Matt Jones, in July of 1987. His Affidavit for Surveyor's Lien was filed on September 10, 1987, and is of record in the Woodford County Clerk's Office in

Encumbrance Book 9, Page 16.

2. Claimants Allen Douglas Jones and Stephen Lee Jones have filed a claim for $43,000.00, plus interest, against the defendant property. As grounds for their claim, they allege that on April 5, 1975, they loaned Matt Jones and Margaret Jones, owners thereof, $43,000.00, which remains unpaid.

APPLICABEL LAW

In United States v. $22,287.00 in United States Currency, 709 F.2d 442, the Sixth Circuit set forth the burden of proof in forfeiture cases, as follows:

> The burden of proof in a forfeiture action is set forth in 19 U.S.C. Sec. 1615, as incorporated by 21 U.S. C. Sec 881 (d):
>
> In all suits or actions . . . brought for the forfeiture of any vessel, vehicle, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon such claimant. . . Provided, that probable cause shall be first shown for the

> institution of such suit or action, to be judged of by the court . . .
>
> Thus, once the government has met its burden of showing probable cause to institute the forfeiture action, the burden then shifts to the claimant to show by a preponderance of the evidence that the property was not subject to forfeiture.
>
> . . .
>
> The probable cause which the government must show is: "a reasonable ground for belief of guilt, supported by less than prima facie proof, but more than mere suspicion." United States v. One 1978 Chevrolet Impala, 614 F.2d 983, 984 (5th Cir. 1980); United States v. One 1975 Mercedes 280S, 590 F.2d 196 (6th Cir. 1978). In making its probable cause showing, however, the government must also establish a nexus " 'between the property to be forfeited and the criminal activity defined by the statute;' i.e., the exchange of a controlled substance." United States v. $364,960 in U.S. Currency, 661 F.2d 319, 323 (5th Cir. 1981).

709 F.2d at 446-447.

The United States may rely on circumstantial evidence in establishing probable cause to bring a forfeiture action. See, U.S. v. $364,960 in U.S. Currency,

supra, and U.S. v. $93,685.61 in U.S. Currency, 730 F.2d 571 (9th Cir. 1984). In the instant action, probable cause was established by the fact that during the course of the search of the defendant real property, Kentucky State Police Detective Ronnie Ray discovered marijuana plants being grown in a "greenhouse" operation housed in two silos on the property. Additionally, several other patches of cultivated marijuana were found on the defendant property, including plants in potting cannisters and halved fifty-five gallon drums. Thus, there is no doubt that the United States had probable cause to initiate this forfeiture action.

FRCP 56(c) provides that a moving party should be granted summary judgment is "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that the moving party is entitled to a judgment as a matter of law." Summary

judgment is an appropriate means of disposing of a forfeiture case. See, U.S. v. $50,000 in U.S. Currency, 757 F.2d 103 (6th Cir. 1985).

DISCUSSION

The plaintiff contends that it is entitled to judgment as a matter of law because the records owners of the defendant real property cannot meet their burden of showing that the property was not used to facilitate a violation of the federal drug laws.

Claimants Matt Jones and Margaret Jones have counterclaimed arguing that they were damaged by the "unlawful, unwarranted and unconstitutional" search and seizure of their real property. They allege this search violated their rights under the fifth, fourth, and eighth amendments. They also seek attorneys' fees on the grounds that the United States was substantially unjustified in bringing this action.

However, the court notes that these

counterclaims were filed before the trial of Matt Jones and Steve Jones in Lexington Criminal Action 87-35. The convictions of Matt Jones and Steve Jones therein essentially nullify these counterclaims.

PROPORTIONAL FORFEITURE

Claimants Matt Jones and Margaret Jones also seem to argue that because the marijuana plants were only found "in or around outbuildings and inside a silo," the entire 127.814 acres should not be forfeited. However, it would appear from the express language of the statute -- "All real property including . . . the whole . . . tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title . . ." -- that the entire property is subject to forfeiture even though only a portion is used in drug production. 21 U.S.C. Sec. 881(a)(7). The Ninth Circuit is in agreement with this interpretation of the statute, as

well as the similar criminal forfeiture statute found at 21 U.S.C. Sec. 853(a). United States v. Littlefield, 821 F.2d 1365, 1367 (9th Cir. 1987) (emphasis added). Furthermore, in a criminal forfeiture action, United States v. Anderson, 637 F.Aupp. 632 (N.D. Cal. 1986), rev'd, 821 F.2d 310 (9th Cir. 1987), the district court expressly recognized that the language of the civil forfeiture statute, 21 U.S.C. Sec 881(a)(7), is to be more broadly applied and contained the language "all" property and not the more narrow "any" property found in the criminal forfeiture statute. Anderson at 635.

Claimants matt Jones and Margaret Jones seem to contend that forfeiture of the entire 127.814 acres is too harsh a punishment and is in violation of the eighth amendment. At least in the context of a criminal forfeiture action, the district court has a constitutional responsibilit6y to "assure that a forefeiture proceeding under section 853 does not inflict excessive

punishment inviolation of the eighth amendment." Littlefield at 1368 (citing United States v. Busher, 817 F.2d 1409, 1415 (9th Cir. 1987). In carrying out this responsibility, the court recommended that a number of factors be considered including the "value of the illegal drugs cultivated on the property, and the nexus between the portion of the property actually used to grow the marijuana plants and the rest of the land." Id.

Because the case at bar is a civil forfeiture action, the court is unsure whether eighth amendment analysis is appropriate in this action. Yet, even if such analysis is applied, the court can find no constitutional violation. In Anderson, the defendants argued that the marijuana grown on their land was only for their personal use. Anderson at 634. Three of the four defendants each cultivated less than 50 marijuana plants; the fourth defendant, Littlefield, cultivated 700 plants on a 40-

acre tract. While the district court rejected the personal use argument, the small amount of marijuana made proportional forfeiture a more attractive option. This may also explain whcy the Ninth Circuit remanded the action on the eighth amendment analysis instead of ordering the immediate forfeiture of property. Littlefield at 1368.

The court notes that use of the eighth amendment analysis is not a back-door method of using proportional forfeiture. Since the statute requires the forefeiture of all the property, a violation of the eighth amendment would prevent the forfeiture of any of the farm, including the silos and the outbuildings containing the marijuana plants. The court is of the opinion that the number of marijuana plants found on the farm of Matt Jones and Margaret Jones justifies for forfeiture of the entire farm. The use of illegal drugs continues to be a serious problem in this country; the marijuana grown on this farm could certainly add to the

problem. The loss of the entire farm owned by claimants Matt Jones and Margaret Jones is consistent with the gravity of the offense and the need to deter other farmers from actively growing marijuana on the family farm or passively permitting it to be grown there.

THE INNOCENT OWNERSHIP DEFENSE

In general, the innocence of a claimant of any criminal offense is not a defense to forfeiture. DeVito v. United States, 520 F.Supp. 127, 129 (E.D. Pa. 1981). See, United States v. One 1980 Chevrolet Corvette, 564 F.Supp. 347, 349 (D. N.J. 1983). However, if the claimant if "exceptionally innocent," as defined by the United States Supreme Court in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), a case involving forfeiture of personal property, then a defense to forfeiture exists. The claimant bears the burden of proving his exceptional innocence. Id. at 689-690. To prove exceptional innocence, the claimant must show that (1) he

was unaware of; and (2) uninvolved in the criminal conduct; and (3) did everything reasonable to prevent the proscribed use of the defendant property. Id. at 689-690.

Thus, real property cannot be forfeited if it is shown that the property was used for drug production "without the knowledge or consent of that owner." 21 U.S. C. Sec 881(a)(7). With the exception of Stephen Jones, all other claimants herein have raised the innocent ownership defense in attempting to prevent forfeiture of the defendant real property and to otherwise protect their respective interests therein. The court will evaluate the merits of the position taken by each claimant and determine if he or she may properly raise the innocent ownership defense, as follows:

A. Matt Jones

At the outset, the court notes that it is cognizant of the fact that Matt Jones is now deceased. The court was orally advised by the respective counsel for the

United States, the Federal Land Bank of Louisville, and Matt Jones and Matt Jones died during the pendency of this action. Nevertheless, the court shall review the merits of his claim.

Although a claimant in a forfeiture action can raise the defense of innocent ownership, the government argues that this defense is not available to claimant Matt Jones because his conviction in the aforementioned Criminal Action NO. 87-35 precludes any relitigation of this issue.

OFFENSIVE COLLATERAL ESTOPPEL

Claimant Matt Jones challenges the government's attempt to preclude the use of the innocent ownership defense. The government is attempting to use the doctrine of offensive collateral estoppel to preclude relitigation of the issue of knowledge by claimant Matt Jones. This issue was decided adversely to claimant Matt Jones by his conviction in United States v. Matt Jones and Steve Jones, Lexington Criminal No. 87-35.

The court is familiar with the doctrine of offensive collateral estoppel. In May v. Oldfield, 698 F.Supp. 124 (E.D. Ky. 1988), United States District Judge Henry R. Wilhoit, Jr. allowed a civil plaintiff to utilize this doctrine against a defendant with a prior criminal conviction. Much of the same reasoning in May, supra, also applies to the facts of the action sub judice. Claimant Matt Jones cannot seriously contend that the same issue, knowledge of the marijuana plants, is not involved in both the criminal action and the present action. Moreover, claimant Matt Jones had even a greater incentive to defend against the criminal charges because of the serious consequences flowing from a felony conviction (e.g., the loss of certain privileges, the possibility of imprisonment, and the payment of a large fine). nevertheless, in the criminal action the jury found Matt Jones guilty on Court 1 of the indictment in Criminal Action 87-35. The standard of proof

in a criminal action is guilt beyond a reasonable doubt, which is a higher burden of proof than a preponderance of the evidence, which is the burden of proof required of the government in the present forfeiture action.

The record reflects that Matt Jones has appealed his conviction in the Lexington Criminal Action 87-35 and that this appeal is presently pending before the United States Court of Appeals for the Sixth Circuit. Obviously, a reversal of his conviction or an acquittal based on the beyond-a-reasonable-doubt standard would not be dispositive in a civil proceeding involving a preponderance-of-the-evidence standard. On the other hand, when a factual issue is essential to a finding of guilt beyond a reasonable doubt, and that decision is final, no argument can be made that it would not also survive the lesser standard of preponderance of the evidence.

The interests of finality to judicial decisions and judicial economy weigh

in favor of applying the doctrine of collateral estoppel to the issue of innocent ownership raised by claimant Matt Jones. He had the advantage of the added protections afforded to criminal defendants in the prior criminal action, including a higher burden of proof. Yet, a jury of his peers found against him.

The record reflects that Matt Jones has filed an answer to the complaint and an affidavit in opposition to the government's motion for summary judgment. His answer and affidavit assert that he was without knowledge that his son was growing marijuana on the defendant property until it was discovered by the Kentucky State Police. Be that as it may, the Court is of the opinion that his answer and affidavit are sufficiently belied by his conviction on Count 1 in Lexington Criminal Action 87-35.

For the reasons stated above, the court finds that Matt Jones is precluded form relitigating in this action the issue of

knowledge of the marijuana plants. However, as this court recognized in May v. Oldfield, supra, a reversal of Matt Jones' conviction would require the court to vacate any judgment in favor of the United States which is based on the grounds of offensive collateral estoppel. May at 127-128.

B. Margaret Jones

Claimant Margaret Jones has also raised the innocent ownership defense. At first blush, it would appear that she might properly raise such defense, since she was not a named defendant in United States v. Matt Jones and Steve Jones, Lexington Criminal Action 87-35. However, bearing in mind the respective proof that is required of the United States and claimant Margaret Jones, the court is persuaded otherwise.

Once the United States has established probable cause for forfeiture, the burden of proof shifts to any claimant to establish a defense. United States v. $22,287.00 in U.S. Currency, supra.

"Innocent ownership" is an affirmative defense that must be proven by the claimant. 21 U.S. C. Sec. 881(a)(7). As set out in this statute, innocent ownership means that a claimant had to be both unaware of and uninvolved in the criminal activity.

The United States contends that because Margaret Jones is not an owner of record of the defendant real property, she can only assert her dower interest therein, which is a mere expectancy contingent upon the death of her spouse, Matt Jones. However, due to the fact that Matt Jones is now deceased, the dower interest of margaret Jones is no longer a mere expectancy; consequently, this inchoate interest has now vested and Margaret Jones is presently at least a partial owner of the defendant property. As an owner and claimant, she has the burden of proving her innocence.

The record reflects that Margaret Jones has filed an answer to the complaint and an affidavit in opposition to the

government's motion for summary judgment. her answer and affidavit assert that she was without knowledge that her son was growing marijuana on the defendant property until it was discovered by the Kentucky State Police. The court observes that her answer and affidavit are mirror images of the answer and affidavit of her husband Matt Jones.

In support of its motion for summary judgment, the United States relies on the affidavits of Kentucky State Police Detective Ronnie Ray, who has been employed by the Kentucky State Police for approximately ten years, and Deputy United States Marshal Robin Maley.

In a seven-page narrative affidavit, Detective Ronnie Ray states that on May 14, 1987, he drove to the residence of Matt Jones and Margaret Jones to discuss a cattle theft that occurred to Matt Jones in the fall of 1986. In discussing the cattle theft and observing the remaining cattle, Detective Ray noticed marijuana plants growing in various

and assorted containers on the defendant property. He states, as follows:

> . . . The barrels had a chicken wire fence around them to keep out the numerous chickens in the area. There were garden hoses originating from the rear of the residence occupied by Margaret Jones that led to the chicken coups(sic) where marijuana plants were growing in halved fifty-five gallon metal drums. The metal drums were outside and in plain sight. The marijuana plants were approximately three feet tall and were visible from the fence line near the residence.

Affidavit of Detective Ronnie Ray, at page 3.

Detective Ray further states, as follows:

> Large electrical lines ran from the dairy barn near the residence to a silo. These large electric lines were easily seen by a casual observer from the residence. Margaret Jones testified in her husband's criminal case that she paid the elctric bills. There were six individual electric meters on the farm and each was billed separately. The electric bill for the dairy barn increased from $40 to $41 dollars per month, for the sixteen months prior to October 1986, to $146.08 on the 12/4/86 billing, $323.40 on the 2/4/87 billing, $214.79 on the 4/6/87 billing,

> to $178.65 on the 6/4/87 billing, and $76.08 on the 8/6/87 billing. Use of the large lights to stimulate growth of the marijuana stopped on May 14, 1987 after law enforcement officers shut down the silo operations. Thereafter electrical use dropped.

Affidavit of Detective Ronnie Ray, at page 5.

Deputy United States Marshal Robin Maley states in her affidavit that she is in charge of the custody and management of all properties seized by the United States. She is responsible for securing and inventorying seized property. On November 18, 1987, she went to the defendant property to videotape the farm and the contents of the residence. She states that at that time she observed a book in the living room of the residence entitled Marijuana Grower's Guide and a magazine entitled "High Times." She states that both the book and the magazine were in plain signt in the living quarters of the residence which Margaret Jones was occupying at the time.

It is well settled that a mere

denial of the allegations of a properly supported motion for summary judgment is not sufficient to defeat such a motion. The opponent "must present affirmative evidence to defeat a properly supported motion for summary judgment." Anderson v. Liberty Lobby, Inc., 447 U.S. 242 (1986), holding that after an adequate time for discovery, if a party cannot meet his burden of proof, summary judgmetn is appropriate; and Matsushita Electric Ind. Co. v. Zenith Radio Corp., 475 U.S. 1348 (1986), holding that summary judgment is appropriate even in a complex case.

The United States contends that Margaret Jones has not come forth with any affirmative evidence of her "innocence" but has merely denied the logical inferences drawn from the proof of the United States.

The court observes that the proof of the United States on its motion for summary judgment is essentially uncontested. The court attaches very little weight to the

affidavit of Margaret Jones. Other than merely denying any knowledge of marijuana being grown on the defendant property, Margaret Jones has failed to come forward with any proof sufficient to rebut the motion of the United States for summary judgment. To reiterate, a mere denial of a properly supported motion for summary judgment will not defeat such a motion. The court is of the opinion that the motion of the United States for summary judgment should be granted.

C. Stephen Jones

Claimant Stephen Jones has not raised the innocent ownership defense and has not opposed the motion of the United States for summary judbment.

D. Federal Land Bank of Louisville

Claimant Federal Land Bank of Louisville holds a mortgage on the defendant property and raises the innocent ownership defense to protect its interest as a mortgage of said property. Federal Land Bank of

Louisville states that on or about May 10, 1972, it loaned Matt Jones and Margaret Jones $77,000.00, which was secured by a first mortgage on the defendant property that was recorded on or about May 25, 1972, and is of record in Mortgage Book 53, Page 224, in the Woodford County Court Clerk's Office.

The Federal Land Bank of Louisville states that as of August 24, 1987, the unpaid principal balance on the aforementioned promissory note was $13,262.11, plus interest accruing at the rate of 13.75% per annum.

None of the other claimants have contested the claim of the Federal Land Bank of Louisville. The court finds that mortgagee Federal Land Bank of Louisville is an innocent owner of the defendant property.

E. Allen Douglas Jones

Claimant Allen Douglas Jones contends that on April 5, 1975, he and Stephen Lee Jones loaned $43,000.00 to Matt Jones and Margaret Jones, who executed a promissory note to Allen Douglas Jones and

Stephen Lee Jones, which was to mature in five years (i.e., April 5, 1980). To secure this loan, claimants Allen Douglas Jones and Stephen Lee Jones hold a mortgage on the defendant property in the principal amount of $43,000.00. This mortgage is of record in Mortgage Book 62, Page 34, in the Woodford County Clerk's Office. Claimant Allen Douglas Jones states that Matt Jones and Margaret Jones have defaulted on their promissory note and that the entire principal balance of $43,000.00, plus interest, remains unpaid.

Claimant/mortgagee Allen Douglas Jones raises the innocent ownership defense to protect his interest in the defendant property. Neither the United States nor any other claimant has proffered any evidence to rebut the claim of Allen Douglas Jones that he may properly raise the innocent ownership defense. Therefore, the court finds that mortgagee Allen Douglas Jones is an innocent owner of the dfendant property.

F. Hargus Sexton

Claimant Hargus Sexton raises the innocent ownership defense to protect two loans he made to Matt Jones and Margaret Jones. On March 25, 1985, he loaned $100,000.00 to Matt and Margaret Jones, who on that same date executed a mortgage to Hargus Sexton to secure the present loan of $100,000.00; this mortgage, of record in Mortgage Book 100, page 533, in the Woodford County Clerk's Office, also secures any additional indebtedness up to $25,000.00. On March 12, 1986, Hargus Sexton loaned $2,000.00 to Matt Jones and Margaret Jones.

It appears that the terms of the aforementioned mortgage secure both of these loans. Mortgagee Hargus Sexton states that Matt Jones and Margaret Jones have defaulted on these two loans and that they are indebted to him in the amount of $102,000.00, plus pre-judgment interest in the amount of $33,273.29.

There is no evidence of record to

rebut the claim of mortgagee Hargus Sexton that he is entitled to the innocent ownership defense. Thus, the court finds that hargus Sexton is an innocent owner of the defendant property.

The record reflects that on May 9, 1988, the court granted the motion of Hargus Sexton for default judgment against Matt Jones and Margaret Jones in relation to the aforementioned indebtedness.

G. United Tobacco Warehouse Company, Inc.

Claimant United Tobacco Warehouse Company, Inc. states that during the time between November 16, 1984 and June 10, 1985, it made five different loans with a cumulative total of $42,630.00 to Matt Jones, itemized as follows:

1. November 16, 1984 - note for $ 3.045.00
2. January 22, 1985 - note for $ 2,537.50
3. March 17, 1985 - note for $20,300.00
4. April 17, 1985 - note for $15,225.00
5. June 10, 1985 - note for $ 1,522.50

This claimant asserts that these five loans

are secured by a mortgage executed by Matt Jones and Margaret Jones on February 8, 1983, to United Tobacco Warehouse Company, Inc., and of record in Mortgage Book 89, Page 637, in the Woodford County Clerk's Office. It seems this mortgage originally secured a loan of $20,000.00, presumably made to Matt Jones on or about February 3, 1983, which is not one of the five loans itemized by United Tobacco Warehouse. however, this claimant contends that in addition to the original loan of $20,000.00, this mortgage also secures any additional indebtedness up to $45,000.00

Claimant United Tobacco Warehouse states that Matt Jones and Margaret Jones have defaulted on these five loans and that they re indebted to the claimant in the principal amount of $42,630.00, plus pre-judgment interest in the amount of $15,005.28.

There is no evidence of record to rebut the claim of United Tobacco Warehouse

Company, Inc. that it is entitled to raise the innocent ownership defense. The court finds that it is an innocent owner of the defendant property.

The record reflects that on May 9, 1988, the court granted the motion of United Tobacco Warehouse Company, Inc. for default judgment against Matt Jones and Margaret Jones in relation to the aforementioned indebtedness.

H. Malcolm Endicott

Claimant Malcolm Endicott, d/b/a Endicott & Associates, states that Matt Jones and Margaret Jones are indebted to him in the amount of $2,500.00, plus interest, for land surveying services he performed for Matt Jones in July of 1987. Pursuant to K.R.S. 376.075, he filed an Affidavit for Surveyor's Lien on September 10, 1987, which is of record in Encumbrance Book 9, Page 16, in the Woodford County Court Clerk's Office.

K.R.S. 376.075 (5) states in pertinent part, as follows:

> (5) . . . If the lienholder complies with the filing requirements under this section, and does so within the time herein fixed, his lien shall be valid and effective against any creditor of, or bonafide or other purchaser from, the owner of the property.

Claimant Malcolm Endicott states that he completed land surveying services for Matt Jones in July of 1987. He timely filed his Affidavit for Surveyor's Lien in the Woodford County Court Clerk's Office on September 10, 1987. Therefore, it appears that he has complied with the filing requirements of K.R.S. 376.075; thus, the court is of the opinion that his claim for $2,500.00, plus interest, is superior to all other claims against the defendant property.

ANALYSIS

Based on 21 U.S.C. Sec. 881(a)(7) and the present state of this record, the court concludes that the the United States should prevail on its motion for summary judgment; however, as the record now stands, with the exception of mortgagee Federal Land

Bank of Louisville and the surveyor lienholder Malcolm Endicott, the court is unable to determine the relative priorities of the other mortgagees and lienholders who have filed a claim against the defendant property.

The Court finds that pursuant to K.R.S. 376.075(5), the Surveyor's Lien of Malcolm Endicott, d/b/a Endicott & Associates, has priority over all the other claims of all other creditors and mortgagees named herein.

The court further finds that mortgagee Federal Land Bank of Louisville is the holder of a mortgage dated May 10, 1972, in the original principal amount of $77,000.00, and of record in Mortgage Book 53, Page 224, in the Woodford County County Clerk's office. On August 24, 1987, Federal Land Bank of Louisville declared this mortgage to be in default. As of August 24, 1987, Federal Land Bank of Louisville states that mortgagors Matt Jones and Margaret Jones

owed an unpaid principal balance of $13,262.11 on this mortgage, plus prejudgment interest at the rate of 13.75% per annum. This mortgage is undisputably the first mortgage of record and has priority over all other mortgages.

However, at this juncture, for the following reasons, the court is unable (1) to determine the relative priority of the remaining mortgages, and (2) to determine the validity of these liens.

First of all, as pointed out by the United States, there are apparently multiple partial releases noted on some of these mortgages; however, the released property has not been identified; therefore, the court is unable to determine what property, if any, the various mortgages still encumber.

Secondly, the United States advises that there is a subordination agreement dated March 25, 1985, between Stephen Jones and Allen Douglas Jones in favor of Hargus Sexton. It appears to the court that this

subordination agreement is not in the record. Additionally, the United States poinrt out that United Tobacco Warehouse is claiming under a mortgage dated February 8, 1983, and Hargus Sexton is claiming under a mortgage dated March 25, 1985. Both United Tobacco Warehouse and Hargus Sexton claim to have second lien priority after Federal Land Bank, which asserts that United Tobacco Warehouse should be claiming under a mortgage dated September 14, 1974.

Finally, in the Status Report of the United states filed on December 6, 1988, the court was advised that the United States and all lienholders were attempting to circulate an agreed stipulation of lien priorities. The court would welcome such an agreed stipulation.

However, in the event that the lienholders (excepting Malcolm Endicott and the Federal Land Bank of Louisville) are unable to reach an agreed stipulation of lien priorities, the court is of the opinion that

the teachings of United States v. Real Property Titled In the Name of Shashin, Ltd., 680 F.Supp. 332 (D. Hawaii 1987), provide the proper framework in which to resolve this forfeiture action. Real Property is similar to the instant action in that it concerns an action for forfeiture of real estate where a mortgagee was held to be an innocent owner. Real Property held that a third-party plaintiff (mortgagee C. Brewer Properties, Inc.) (1) was an innocent lienholder, (2) could shielf its rights from forfeiture under 21 U.S.C. Sec. 881(a)(6), and (3) was entitled to a judgment against the defaulting mortgagor for the mortgage indebtedness, together with interest, and its right to enforce collection through foreclosure. The court also held that the innocent owner/mortgagee was entitled to judgment against the government, establishing its right as an innocent owner of the mortgage; however, the court noted that the government, by reason of its seizure had certain rights

in the property which it could invoke pursuant to 28 U.S.C. Sec. 2409a(b).

In a nutshell, Real Property recognized the rights of both an innocent owner/mortgagee to foreclose on the mortgaged property and the United States to simultaneously possess and control this property while procceding with a forfeiture action. The court noted, as follows:

> The government is therefore free to proceed with the forefeiture and if suffessful, which presumably it will be since there appears to be no opposition, it will have the alternative of releasing the property to C. Brewer for foreclosure or retaining the property and paying the claimant its due.

680 F.Supp. at 335. Real Property holds that the United States may elect to retain the property and pay the innocent owner/mortgagee the unpaid principal balance of the mortgage, plus interest accruing both before and after seizure of the property, or instead, the United States can release the property to the innocent owner/mortgagee for foreclosure

proceedings.

The bottom line in Real Propery is that once the government makes its election under Section 2409a, the innocent owner/mortgagee may pursue compensation under Section 881(a)(6) to recover principal in full, interest, including that acquired post-seizure, and other charges and costs provided for in the loan agreement. However, in the meantime, the government may proceed with the forfeiture proceeding, which essentially puts the interest of the innocent owner/mortgagee on hold until the forefeiture action is completed.

Concerning the motion of Matt Jones and Margaret Jones for oral argument on the motion of the United States for summary judgment, the court is of the opinion that this motion has been exhaustively briefed and that oral argument would shed no new light on this matter. The motion for oral argument will be denied.

An Order and Judgment in accordance

with this Memorandum Opinion will be entered on the same date herewith.

This 31st day of August, 1989.

SCOTT REED, SENIOR JUDGE

(2)

No. 91-829

In the Supreme Court of the United States

OCTOBER TERM, 1991

ESTATE OF MATT JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was collaterally estopped in a civil forfeiture action from contesting that its decedent, who had been convicted of conspiracy to produce marijuana, knew of the conspiracy.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is unpublished, but the judgment is noted at 941 F.2d 1210 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 16, 1991. The petition for a writ of certiorari was filed on November 14, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In a civil action brought pursuant to 21 U.S.C. 881(a)(7) in the United States District Court for the Eastern District of Kentucky, the United States

sought forfeiture of Matt Jones's farm following Jones's conviction for conspiracy to manufacture, produce, and grow marijuana, in violation of 21 U.S.C. 846. Gov't C.A. Br. 3. The district court granted the government's motion for summary judgment, Pet. App. 10c-21c, and the court of appeals affirmed as to petitioner. Pet. App. 1a-14a.[1]

1. On May 14, 1987, Kentucky State Police Officer Ronnie Ray visited the Jones farm to investigate cattle theft. Ray observed in plain view cultivated marijuana in a field near the house. Ray ultimately discovered 212 marijuana plants in potted containers in outbuildings and in an open field on Jones's land. Pet. App. 2a-3a. Following a jury trial, Matt Jones was convicted on one count of conspiracy to manufacture, produce, and grow marijuana.[2]

During the pendency of those proceedings, the government filed the present action for civil forfeiture under Section 881(a)(7). Matt Jones died following his criminal conviction but prior to the conclusion of the forfeiture action. Pet. App. 4a. Subsequent to the entry of judgment in the criminal case, the district court in this case granted the government's motion for summary judgment. The court determined in relevant part that Matt Jones's criminal conviction

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[1] Margaret Jones, the wife of petitioner's decedent, was not criminally prosecuted, but intervened in the forfeiture proceedings to protect her interest in the property. The district court also granted the government's motion for summary judgment as to Margaret Jones. The court of appeals, however, reversed and remanded as to her, concluding that there was a material issue of fact regarding her knowledge of the unlawful activity on the property. Pet. App. 10a-14a.

[2] The jury acquitted Matt Jones of producing marijuana and of possessing marijuana with the intent to distribute it. Pet. App. 3a.

precluded an assertion of the innocent owner defense. Pet. App. 17c-21c.[3]

2. The court of appeals affirmed the district court's holding that the innocent owner defense was unavailable as to Matt Jones. Pet. App. 4a-10a.[4] The court reasoned that Jones's conviction for conspiracy to produce marijuana collaterally estopped petitioner from contesting Jones's knowledge of or consent to the growing of the marijuana on his farm:

> The issue at the criminal trial was Matt Jones' involvement in the production of marijuana. The jury convicted him of the conspiracy charge. In order to convict, the jury necessarily would have found that Matt Jones knew about and consented to the marijuana discovered on his farm. * * * [N]o genuine issue of material fact exists as to whether Matt Jones had knowledge of the use of his property or consented to the use.

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[3] Petitioner exclusively contests the award of summary judgment on the innocent owner defense, which provides that "no property shall be forfeited * * *, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." 21 U.S.C. 881(a)(7).

[4] The district court had applied the "exceptionally innocent" owner defense, which requires the owner to establish that he was uninvolved in and unaware of the criminal conduct, and that he had taken all reasonable steps to prevent the prohibited use of the property. Pet. App. 15c-16c. The court of appeals agreed with petitioner that this defense was inapposite in cases, such as the present one, that involve real, rather than personal, property. Pet. App. 5a. The court concluded that the inquiry in this context properly turned on whether the proscribed activity occurred without petitioner's knowledge or consent. Pet. App. 7a. Even under the more relaxed standard, however, the court concluded that petitioner was collaterally estopped from asserting the defense. *Ibid.*

Pet. App. 9a. The court of appeals accordingly held that there was no issue of material fact concerning Matt Jones's knowledge or consent, and that the district court properly granted summary judgment for the government. Pet. App. 9a-10a.

ARGUMENT

Petitioner contends that the district court erred in holding that Matt Jones's conviction for conspiracy to produce marijuana collaterally estopped petitioner from asserting the defense that Jones did not know of or consent to a conspiracy to cultivate marijuana on his farm. Pet. 15-20. That contention is without merit.

The relevant statute provides for forfeiture of "[a]ll real property * * *, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment." 21 U.S.C. 881(a)(7). Matt Jones was convicted of one of the covered offenses—conspiring to manufacture, produce, and grow marijuana, in violation of 21 U.S.C. 846. To establish a violation of Section 846, the government was required to prove "the existence of an agreement to violate the drug laws and that each conspirator knew of, intended to join and participated in the conspiracy." *United States* v. *Pearce*, 912 F.2d 159, 161 (6th Cir. 1990) (quoting *United States* v. *Stanley*, 765 F.2d 1224, 1237 (5th Cir. 1985)), cert. denied, 111 S. Ct. 978 (1991). As the court of appeals correctly observed, the facts adduced at Matt Jones's criminal trial concerned *only* the marijuana discovered on Jones's farm. Pet. App. 9a. To convict Matt Jones, therefore, the jury had to find that he knew of and was a party to an agreement to cultivate marijuana on his farm. Hence, the precise issue underlying the innocent owner defense

—whether the conspiracy was effected without Matt Jones's "knowledge or consent," 21 U.S.C. 881(a)(7) —was actually litigated during the criminal trial, and the contrary determination was necessary to the criminal judgment. Under applicable standards governing issue preclusion, see, *e.g.*, *United States* v. *Smith*, 730 F.2d 1052, 1057 (6th Cir. 1984),[5] the court of appeals properly held petitioner's innocent owner defense to be precluded as a matter of law.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

ANDREW LEVCHUK
Attorney

JANUARY 1992

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[5] Petitioner does not contest the Sixth Circuit's standard for determining issue preclusion, as explained in *United States* v. *Smith*, 730 F.2d at 1057. Rather, petitioner claims that the Sixth Circuit misapplied *Smith* in this case. Pet. 15-16. That claim does not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

[6] It is well settled that in a civil forfeiture proceeding a court may give collateral estoppel effect to issues necessarily determined in a prior criminal case. See, *e.g.*, *United States* v. *All Right, Title & Interest in Real Property & Building Known as 303 West 116th Street, New York, New York*, 901 F.2d 288, 291-292 (2d Cir. 1990); *United States* v. *"Monkey"*, 725 F.2d 1007, 1010 (5th Cir. 1984); *United States* v. *Parcel of Land & Buildings Located Thereon at 40 Moon Hill Road, Northbridge, Massachusetts*, 721 F. Supp. 1, 3 (D. Mass. 1988), aff'd, 884 F.2d 41, 42-43 (1st Cir. 1989).

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